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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

vs. *Petitioners,*

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

RESPONSE OF THE STATE OF ILLINOIS TO THE BRIEFS AMICI CURIAE OF THE MID-AMERICA LEGAL FOUNDATION, THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND THE STATE OF WISCONSIN.

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INTRODUCTION.

This supplemental brief is filed pursuant to Rule 24.5 and Rule 42 of the Rules of the Supreme Court of the United States, and presents the State of Illinois' response to the new, intervening material presented by the Amici Curiae in their Briefs in Support

of the Petition for the Writ of Certiorari of The City of Milwaukee, et al. Illinois is filing its supplemental brief at this time, as it now appears that all Amici have filed their arguments.

STATEMENT OF THE CASE.

The State of Illinois respectfully refers this Court to the Statements of the Case set out in the Brief of the State of Illinois in Opposition to the Petition for a Writ of Certiorari, and in the State of Illinois' Petition for a Writ of Certiorari (79-571), both of which have previously been filed with this Court.

QUESTIONS PRESENTED.

The State of Illinois respectfully refers this Court to Questions Presented in the Brief of the State of Illinois in Opposition to the Petition for a Writ of Certiorari and in its Petition for a Writ of Certiorari (79-571), both of which have been previously filed with this Court.

ARGUMENT.

I.

THE ORDER OF THE DISTRICT COURT IS CONSISTENT WITH THE PROVISIONS OF THE CLEAN WATER ACT.

A.

Introduction.

The Amici contend that this Court should grant certiorari in order to stabilize an area of unsettled law, i.e., the relationship between the common law of nuisance and the scheme of the Clean Water Act in correcting discharges of raw sewage. The heart of their contention is, that although raw sewage which enters a treatment plant must be treated, raw sewage which is discharged from the pipe prior to reaching the treatment plant need not be treated. This flies in the face of the Court of Appeals' statement that:

> "It is doubtful whether anyone, layman or expert, would argue that the discharge of raw sewage into public waters is a satisfactory alternative to collection and treatment. . . ." Appendix A-34[1]

Their arguments in support of their contention take a number of forms:

1. The Association of Metropolian Sewerage Agencies, et al. (hereinafter called "AMSA") and Mid-America Legal Foundation argue that the common law ought to be discarded in favor of determinations to be made by purported experts in the federal bureaucracy. The

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1. The Court of Appeals noted that even defendants' officials and consultants agreed that the raw sewage overflows were not an acceptable long term alternative. (*Id.*)

Court of Appeals in this case and other courts have uniformly rejected this argument.

2. Wisconsin argues that the Clean Water Act has preempted the federal common law of nuisance. In fact, the Clean Water Act expressly preserves common law remedies.
3. AMSA also argues that granting a permit should insulate the permittee from common law actions. But case law is almost unanimous in holding that a permit is not a defense to a charge of public nuisance.
4. Finally, AMSA argues that the Court of Appeals should have followed the scheme of the Clean Water Act and reversed the District Court's order eliminating overflows, and directed the District Court to consider cost-effective remedies. But that is exactly what the Court of Appeals did here. The Court of Appeals noted the requirement that sewage discharges from publicly owned treatment works (POTW) meet the secondary treatment effluent limitations of § 301(b)(1)(B). Since § 212 of the Act defines treatment works for federal grants to include sewers (both combined and separate), the Court simply applied the logic of the statute. See Appendix A-10 through 13. Moreover the District Court's order, affirmed by the Court of Appeals, allows Milwaukee to select the most cost-effective alternative of eliminating the raw sewage overflows.

B.

An NPDES Permit Issued Under the Clean Water Act Does Not Bar Common Law or State Statutory Action for Relief Against Water Pollution.

The municipal dischargers (AMSA) and other Amici raise an argument that has been repeatedly raised by polluters and rejected by the courts. Basically the municipal dischargers want

EPA to be the exclusive entity to determine the timing—and more importantly, the degree—of pollutant clean-up by dischargers. These dischargers want no independent role for state attorneys general, for states attorneys or for any other public or private entity who may be injured or aggrieved by pollution created under the protective umbrella of an EPA NPDES permit.

This basic argument of exclusivity has taken on a number of legal guises: preemption, exhaustion of administrative remedies, primary jurisdiction, deference to agency "expertise", the permit as a bar to more stringent remedies, etc. The Attorney General of Illinois has faced this argument repeatedly in suits brought by the Attorney General's office against intrastate and interstate polluters. On several occasions, major polluters of Lake Michigan have worked out "consent" decrees or consent permits with the state administrative agency or EPA while the Attorney General's case was on trial and near judgment. Indeed, in some of those cases, the Attorney General has been faced with lenient pollution control permits from the Illinois state agency. In all of these cases, the right of the Attorney General or local government to sue for tighter controls under common law or statutory authority has been upheld. *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill. App. 3d 607, 352 N. E. 2d 225, 228-29 (1976); *Metropolitan Sanitary District* v. *United States Steel Corporation*, 30 Ill. App. 3d 360, 332 N. E. 2d 426, 432-33, *appeal denied*, 60 Ill. 2d 597 (1975), *cert. denied*, 424 U. S. 976 (1976).[2] *See, State* v. *Dairyland Power Cooperative*, 52 Wis. 2d 45, 187 N. W. 2d 878, 880-81 (1971); *Costas* v. *City*

2. It is mildly ironic that one of the leading cases upholding the right of local governments to seek stronger relief was brought and successfully prosecuted by the pollution control arm of the Metropolitan Sanitary District of Chicago, one of amicus AMSA's principal members. Compare *Metropolitan Sanitary District* v. *United States Steel Corporation, supra,* with the position taken by AMSA here. The Attorney General of Illinois co-prosecuted that case with the Sanitary District to protect Chicago's water supply from steel mill discharges in Indiana.

of Fond du Lac, 24 Wis. 2d 409, 129 N. W. 2d 217, 220 (1964); *Commonwealth ex rel. Schumaker* v. *New York and Pa. Co.,* 367 Pa. 40, 79 A. 2d 439, 445 (1951); *State ex rel. Shevin* v. *Tampa Electric Co.,* 291 So. 2d 45, 47-48 (Fla. App. 1974). *See also, Baltimore & Potomac R. Co.* v. *Fifth Baptist Church,* 108 U. S. 317, 334-35 (1883). See opinion below, Appendix A-6 to A-20.

AMSA relies on the solitary case of *Potomac River Association, Inc.* v. *Lundeborg Maryland Seamanship School, Inc.,* 402 F. Supp. 344 (D. Md. 1975), which is inapplicable here. That case involved dredging and filling under a valid permit issued by the Corps of Engineers under Section 10 of the Rivers and Harbors Act of 1899. The Rivers and Harbors Act of 1899, unlike the Clean Water Act, does not expressly preserve private rights of action. Section 505(e) of the Clean Water Act, 33 U. S. C. § 1365(e), expressly states that the grant of standing under § 505 shall not "restrict any right which any persons (or class of persons) may have under any statute or common law. . . ." As set out in more detail in Illinois' Brief in Opposition, the legislative history makes it clear that common law actions are to be preserved.

C.

The Remedy Approved by the Court of Appeals Is Wholly Consistent with the Clean Water Act.

The Court of Appeals followed the scheme of the Clean Water Act when it held that Milwaukee was required to collect and treat all of its sewage including that now discharged from its sanitary sewer and combined sewer overflows. The Appellate Court recognized the logical inconsistency in requiring treatment of sewage which reaches the treatment plant, while allowing sewage discharges from the pipe upstream to go untreated. Appendix A-34. The Court of Appeals noted that Congress required publicly owned treatment works to achieve secondary treatment by July 1, 1977. Appendix A-21. Treatment works

include interceptor sewers, outfall sewers, sewage collection systems, and systems to dispose of stormwater runoff. Clean Water Act § 212(2), 33 U. S. C. § 1292(2).

The Court of Appeals' decision is also consistent with the statutory scheme of the Clean Water Act to the extent that the Act calls for least cost alternatives of pollution control. In its brief, AMSA argues that Congress, in the Clean Water Act, considered cost effectiveness a key ingredient in the development of an overflow correction strategy. AMSA Brief at 13. The State of Illinois agrees that Milwaukee ought to employ the least cost alternative to collect the raw sewage for treatment. The order of the District Court, affirmed by the Court of Appeals, provides for modification of the judgment order to allow lower cost methods of sewage collection to be installed if Milwaukee can establish that such methods are feasible. Appendix D-4.

II.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE DISTRICT COURT'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS.

A.

Introduction.

The Amici contend that both lower courts erred in holding that the plaintiff must prove its case by the preponderance of the evidence, rather than by the stricter standard of clear and convincing evidence. The logic behind the clear and convincing standard is inapplicable in the case at bar. The correct standard is preponderance of the evidence.

B.

The Circuit Court Applied the Correct Standard of Proof.

As a preliminary matter, both the District Court and the Court of Appeals found that the correct standard of proof to

apply in this case was preponderance of the evidence. Appendix A-26; F-3. But both courts stated that either standard, preponderance of the evidence or clear and convincing evidence, would produce the same result. *Id.*

The setting of a higher standard of proof in cases involving certain equitable relief has clearly defined historical justification. In *Mugler* v. *Kansas,* 123 U. S. 623 (1887), Justice Harlan stated that equity will not restrain a nuisance "except upon clear and convincing evidence that one exists." 123 U. S. at 673. What Justice Harlan referred to was the historic equity practice of withholding preliminary injunctive relief in cases of conflicting evidence. Equity's jurisdiction originally was limited to preliminary relief pending a decision on the controversy at law.

Public nuisance cases were originally criminal actions. The offender was indicted, tried by a jury, and, if convicted, ordered to abate the nuisance. In equity, the chancellor intervened only when "there was imminent danger of irreparable msichief before the tardiness of the law could reach it." *City of Georgetown* v. *The Alexandria Canal Company,* 37 U. S. (12 Pet.) 91, 98 (1838). Chancellors were reluctant to intervene because they sat without a jury and, before 1900, they did not hear and observe witnesses, but received testimony in the form of depositions. Therefore equity intervened only where the evidence was "determinate and satisfactory." 2 *Story's Equity Jurisprudence* §§ 1251, 1252 (14th Ed. 1918). *See, Missouri* v. *Illinois,* 180 U. S. 208, 248 (1901). Courts of equity intervened only prior to an action at law. If the evidence was not clear and convincing, then the action was heard in a court of law:

> "If the legal right is doubtful the practice appears to be to leave that question to trial at law."
>
> 2 *Story's Equity Jurisprudence* § 1250 n. 4

However, once the question of liability was determined at law, an abatement order was entered. Concepts of irreparable harm, imminent danger, the need for "clear and convincing evidence," all went to the issue of Equity's intervening prior to trial on the merits at law. Now that law and equity have merged, and the trial judge who sits as the chancellor also sits as the trier of fact, there is no justification for the rule. While these limitations may still be appropriate when granting preliminary injunctive relief prior to trial, they certainly do not apply to a decision made after a full trial on the merits.

The clear and convincing requirement may have another function in the original jurisdiction cases before this Court. This Court appears to have applied the clear and convincing standard of proof to discourage exercise of its original jurisdiction. This reasoning is reflected by this Court's statement in *Missouri* v. *Illinois,* 200 U. S. 496 (1906).

> "Before *this* Court ought to intervene the case should be of serious magnitude, clearly and fully proved. . . ."
>
> 200 U. S. at 521 (emphasis added)

In *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U. S. 493 (1971), Justice Harlan indicated that had Ohio's nuisance action been brought under the Court's original jurisdiction, it would have been subject to an "unusually high standard of proof." 401 U. S. at 501 & n. 4.

The Amici ask this Court to extend an unusually high standard of proof to civil cases at the district court level. None of the reasons which supported application of the clear and convincing standard of proof in cases between states, brought as original actions before this Court prior to the merger of law and equity, would support extending this standard to the case at bar.

The Circuit Court was also correct in holding that the evidence in the District Court was sufficient to prove the existence of a public nuisance. As discussed above, this Court, in *Missouri* v. *Illinois,* 200 U. S. 496 (1906); *New York* v. *New Jersey,*

256 U. S. 296 (1921); *North Dakota* v. *Minnesota,* 263 U. S. 365 (1923), employed a vastly higher standard of proof, inapplicable in the instant case. In *Missouri* v. *Illinois,* and *New Jersey* v. *New York,* this Court noted that the plaintiffs' own discharges were sufficient to create the hazard of which they complained, and therefore found that the defendants were entitled to demand "strictest proof" that they were the cause of any increased incidence of disease. 200 U. S. at 521-23; 256 U. S. at 303. In *North Dakota* v. *Minnesota,* this Court found not only that North Dakota failed to meet the clear and convincing standard but that,

> "The experts called by Minnesota in this case seemed to us to use more specific and accurately ascertained data for their estimates than those from North Dakota, and this circumstance, as well as the more satisfactory reasons given, lead us to think that their conclusions are more to be depended upon."
>
> 263 U. S. at 386.

In the instant case, the District Court also commented extensively on the credibility of each of the parties' witnesses. Appendix F-4 to F-6; F-8 to F-10; F-18; F-20. But here, unlike *North Dakota* v. *Minnesota,* the conclusions of the experts favored the plaintiff.

The Amici imply that the Court of Appeals should have ignored the clearly erroneous standard of Rule 52, Fed. R. Civ. P. Likewise they assert that this Court should review and reexamine the evidentiary findings of the District Court. This Court is loath to review findings of fact in which the Appellate Court has concurred. *Goodyear Tire and Rubber Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275, 278 (1944).

III.

THE LAW DOES NOT PERMIT A PUBLIC HEALTH HAZARD TO PERSIST ON A CLAIM OF ECONOMIC INCONVENIENCE.

The Amici contend that equity requires consideration of costs. Although this may be true for wholly economic injuries, *City of Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 339 (1933), the rule does not apply here, where considerations of public health are involved. *Harrison* v. *Indiana Auto Shredders Co.*, 528 F. 2d 1107, 1122 (7th Cir. 1976); *Commonwealth ex rel. Schumaker* v. *New York and Pennsylvania Co.*, 367 Pa. 40, 79 A. 2d 439, 444 (1951); *People ex rel. Stream Control Commission* v. *City of Port Huron*, 305 Mich. 153, 9 N. W. 2d 41, 43-44 (1943); *Board of Commissioners of Ohio County* v. *Elm Grove Mining Co.*, 122 W. Va. 442, 9 S. E. 2d 813, 817 (1940).

Moreover, the District Court addressed costs in its order. Appendix F-28. Defendants' own expert, Heaps, estimated that the total project cost would be less than $6.00 per household per month *without federal assistance*. Gordon Culp, a nationally known engineering expert, estimated that advanced wastewater facilities would cost $1.80 per household per month. But even where costs were more severe, courts have required states to engage in substantial expenditures to protect the legal rights of neighboring states. As this Court stated in *Wisconsin* v. *Illinois*, 289 U. S. 395 (1933), when it ordered Illinois to build expensive sewage treatment plants rather than diverting large amounts of water, a less expensive alternative which would have harmed Wisconsin,

> "Despite existing economic difficulties, the State has adequate resources, and we find it impossible to conclude that the State cannot devise appropriate and adequate financial measures to enable it to afford suitable protection to its people to the end that its obligation to its sister States, as adjudged by this Court, shall be properly discharged."
>
> 289 U. S. at 410

IV.

MISCELLANEOUS.

A.

The Amici's Claim That the Court of Appeals' Decision Will Result in a Flood of Litigation Is Wholly Unfounded.

The Amici make the worn and tattered argument that the Court of Appeals' decision here will initiate a flood of litigation against municipalities and municipal sewerage agencies, which will result in unpredictable pollution control costs. There is no historical support for this claim.

The "floodgates" of litigation under the federal common law of nuisance opened in 1972 when this Court announced that the federal common law of nuisance applied to interstate pollution. But the cases passing through them have amounted to less than a trickle. Other than *Illinois* v. *City of Milwaukee,* now before this Court, only two cases have been filed in which plaintiffs relied solely or primarily on the federal common law to support their claims. *California Tahoe Regional Planning Agency* v. *Jennings,* 594 F. 2d 181 (9th Cir. 1979); *Byram River* v. *City of Port Chester,* 394 F. Supp. 618 (S. D. N. Y. 1975).

B.

The District Court Was Not Required to Defer to a Compromise Reached in and Approved by a Wisconsin State Court.

The Amicus, State of Wisconsin, urges that the District Court should have deferred to the judgment of its state district court. This is an incredible argument. This Court has held that Illinois does not have to lower itself to the more degrading standards of a neighbor. *Illinois* v. *City of Milwaukee,* 406 U. S. 91, 107 (1972).

The "judgment" Wisconsin refers to is nothing more than a hollow agreement reached by Milwaukee and the Wisconsin

Department of Natural Resources and approved by the court. The agreement lacks provisions necessary to protect the health of Illinois residents.

No questions of comity are involved here. Nothing in the *Milwaukee* judgment will prevent Wisconsin from enforcing the order of its state court. What Wisconsin asks is that this Court allow Milwaukee to conform to standards set out in a settlement in which Illinois did not participate, standards which are not as strict as those which the District Court found were necessary to protect Illinois residents, standards which would allow Milwaukee to continue its past practice of creating a public nuisance.

CONCLUSION.

For the foregoing reasons, the briefs of the Amici Curiae fail to raise issues of such paramount importance as to warrant granting Milwaukee's Petition for a Writ of Certiorari.

Respectfully submitted,

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